STATE OF MICHIGAN

COURT OF APPEALS

RON RUTHERFORD, MELISSA STEMPLE, MIKE LOYNES, DANIEL CRAMER, JAMES B. RACE, JOYCE A. WILSON, and UNITED RETIRED GOVERNMENTAL EMPLOYEES,

Plaintiffs-Appellants,

v

CITY OF FLINT and EDWARD KURTZ,

Defendants-Appellees.

UNPUBLISHED
September 20, 2007

No. 271124
Genesee Circuit Court
LC No. 03-076113-NZ

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motion for summary disposition. We affirm.

The issues presented in this case have been the subject matter of two prior appeals before this Court. Briefly, plaintiffs retired from the city of Flint between 1991 and 2000, and submitted the calculation of their retirement benefits by counting a 365-day period that included 27 pay periods. Apparently, the practice began in 1991, when an enterprising employee selected a Friday payday and counted back 365 days to end on another Friday payday. However, this computation resulted in the inclusion of 27 rather than 26 pay periods in a given year. Although some supervisors became aware of the computation and even took advantage of that method of computation themselves, the issue was not addressed until defendant city found itself in an emergency financial crisis and emergency financial manager, defendant Edward Kurtz, issued directives to recalculate the retirement benefits. However, the recalculation of benefits continued to allow retirees to utilize one 27 pay period year of the three years utilized in computing benefits. Plaintiffs filed a constitutional challenge to the recalculation of benefits and also alleged promissory estoppel. The trial court denied plaintiffs' motion for summary disposition and granted defendants' motion for summary disposition.

This Court reviews de novo a trial court's resolution of a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). The trial court must consider affidavits, pleadings, depositions, admissions, and any other evidence submitted by the

parties in a light most favorable to the nonmoving party. *Id.* at 539-540. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Id.* at 540; MCR 2.116(C)(10) and (G)(4).

Plaintiffs first allege that the trial court's decision was contrary to Const 1963, art 9, § 24. We disagree.

Const 1963, art 9, § 24 provides:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits, annual funding. Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfounded accrued liabilities.

At issue is whether the retirement benefit that was determined according to a final average compensation based on three 27-pay period years was an accrued financial benefit that was shielded from diminishment or impairment under this constitutional protection.

In order to determine if a constitutional violation occurred, the calculation of the retirement benefits must be examined to determine if the inclusion of 27 pay periods constituted an "accrued financial benefit." The ordinance defines "final average compensation" as follows:

> FINAL AVERAGE COMPENSATION. . . . [for members of applicable bargaining units] shall mean the average of the highest annual compensation paid a member during any period of three years of his credited service contained within his five years of credited service immediately preceding the date his employment with the City last terminates. [Retirement Ordinance, § 35-6, p 480.]

The rules of statutory construction apply to the interpretation of municipal ordinances. *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). When interpreting constitutional provisions, this Court must determine "the text's original meaning to the ratifiers, the people, at the time of ratification." *Co Rd Ass'n of Michigan v Governor*, 474 Mich 11, 14-15; 705 NW2d 680 (2005). Issues of statutory construction present questions of law that are reviewed de novo on appeal. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The goal of statutory construction is to discern and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning, and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). Terms used in a statute must be given their plain and ordinary meaning, and it is appropriate to consult a dictionary for definitions. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). "The enactment and enforcement of ordinances related to municipal concerns is a valid exercise of municipal police powers as long as the ordinance does not conflict with the constitution or general laws." *Gora, supra*. Ordinances must be construed in a constitutional manner if possible, and because they are presumed to be

constitutional, the party challenging the validity of the ordinance must prove the constitutional violation. *Id*. at 711-712.

The term "annual" is defined as "of, for, or pertaining to a year; yearly." Random House Webster's College Dictionary, (2nd ed), p 54. Consequently, the term "annual compensation" refers to that compensation earned in a one-year period. There is no provision in the retirement ordinance for benefits that exceed a one-year period. Therefore, the plain language of the ordinance at issue provides for the computation of retirement benefits based on a 365-day period. The inclusion of bi-weekly pay periods that exceed the 365-day period is not accounted for in the retirement ordinance.[1] Therefore, it was erroneous to allow retirees to use 27 pay periods in calculating benefits.

This decision is consistent with prior appellate decisions that examined what constitutes annual compensation. In *Stover v Retirement Bd of the City of St Clair Shores Firemen & Police Pension Sys*, 78 Mich App 409, 412-413; 260 NW2d 112 (1977), this Court held that payments for unused sick and vacation days should not be included in calculating a retiree's average final compensation, because these payments were not pay that an employee received "for work done that year." In *Lansing Firefighters Ass'n Local 421 v Bd of Trustees of the City of Lansing Policemen's & Firemen's Retirement Sys*, 90 Mich App 441, 445; 282 NW2d 346 (1979), this Court rejected the plaintiffs' argument that their final average compensation should include accrued vacation time, because annual compensation only included payments "made and received annually for work done that year." In this case, the trial court properly granted defendants' motion for summary disposition. The calculation of retirement benefits using the 27 pay period formula was contrary to the plain language of the retirement ordinance, *DiBenedetto*, *supra*, and therefore, cannot constitute an accrued financial benefit for purposes of Const 1963, art 9, § 24.[2]

---

[1] Our interpretation is consistent with prior unpublished decisions from this Court. See *Miller v City of Flint*, unpublished opinion per curiam of the Court of Appeals, issued February 27, 2007 (Docket No. 271430); *Flint Professional Firefighters Union Local 352 v City of Flint*, (*Flint Firefighters*) unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket Nos. 244953, 244961, 244985). We note that plaintiffs' brief on appeal attempts to distinguish the *Flint Firefighters* decision on various grounds. Consequently, we have engaged in an independent review of the language of the ordinance at issue and conclude that it did not account for the calculation of benefits submitted by plaintiffs and approved by supervisors for defendant city without seeking a legal analysis of the interpretation of the retirement ordinance. Although these decisions are not binding precedent, they are persuasive. See *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003).

[2] In rendering this decision, we are mindful that retirees live on a fixed income and an alteration to their benefits is significant. However, the retirement ordinance at issue was not uniformly calculated on an annual formula. Rather, an enterprising employee calculated his benefits to include 27 pay periods, and his supervisor, who later took advantage of the same computation, did not raise the legality of the issue in accordance with the language of the retirement ordinance. This calculation "loophole" benefited, not all retirees, but those who were fortunate enough to proffer this calculation. The calculation was finally called into question because of the dire

(continued…)

Plaintiffs further alleged that they were deprived of a property interest without due process of law. We disagree. Plaintiffs did not have a reasonable expectation of receiving a benefit in excess of that authorized by the retirement ordinance, so they cannot establish a due process claim.

The Michigan Constitution precludes the government from depriving a person of life, liberty, or property without due process of law. Const 1963, art 1, § 17. This protection requires that one be given notice and afforded an opportunity to be heard before being deprived of a property interest. *In re Wayne Co Treasurer*, 265 Mich App 285, 293; 698 NW2d 879 (2005). A procedural due process analysis requires a dual inquiry: (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient. *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 605-606; 683 NW2d 759 (2004). To satisfy the first part of this inquiry, the person claiming due process protection must establish a legitimate claim of entitlement to the property interest, and not just a unilateral expectation of entitlement. *Attorney Gen v Flint City Council,* 269 Mich App 209, 215-216; 713 NW2d 782 (2005).

As addressed above, plaintiffs had no right to employ three 27 pay period years to calculate their final average compensation. Thus, the improperly calculated benefit was not protected by Const 1963, art 9, § 24. The failure to correct an erroneous procedure did not establish a legitimate entitlement in the overpayment of the retirement benefit. Accordingly, plaintiffs cannot satisfy the first part of the due process inquiry. Furthermore, the trial court's order provides that individual retirees may challenge defendant city's selection of years in determining the final average compensation if they can demonstrate that another proper method of selection would result in a higher benefit. Accordingly, the order provides sufficient due process protections to ensure that plaintiffs' interest in properly paid benefits is not infringed by defendants' actions to correct and collect past overpayments.

Lastly, plaintiffs assert that defendants are equitably estopped from recalculating their retirement benefits. We disagree. In order to recover on a promissory estoppel theory, plaintiffs must prove the following elements:

> (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. [*Ardt v Titan Ins Co,* 233 Mich App 685, 692; 593 NW2d 215 (1999) (internal quotation marks and citation omitted).]

(…continued)

financial condition of the city. Indeed, although plaintiffs quote a portion of Const 1963, art 9, § 24, they fail to cite the portion of the law that requires a city to fund pension and retirements based on the service in each fiscal year. Plaintiffs failed to submit evidence to indicate that the funding for "each fiscal year" accounted for 27 pay periods. The continued availability of retirement benefits is contingent on the managers of the municipality acting in a financially responsible manner that does not benefit some to the detriment of others.

In their complaint, plaintiffs set forth a "statement of claim for equitable estoppel." They alleged, "In reliance upon the Defendants' representations, conduct and inaction, Plaintiffs have made decisions and taken action which they would not have taken." Plaintiffs labeled this claim "equitable estoppel," but the substance of the allegations clearly invoked the doctrine of promissory estoppel.

Although defendants failed to address the substantive merits of plaintiffs' promissory estoppel claim, the trial court did not err in granting them summary disposition with respect to this claim. Plaintiffs did not offer any documentary evidence supporting that they, as a class or individually, would not have retired but for their belief that they would receive pension benefits based on 27-pay period years. Accordingly, summary disposition was proper under MCR 2.116(C)(10).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto